

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE R. BUTTON, f/k/a MICHELLE R.
BROWN,

UNPUBLISHED
April 22, 2014

Plaintiff-Appellee,

v

TIM BILLS TRUCKING, INC. and MICHAEL
DWAYNE TYLER,

No. 306724
Osceola Circuit Court
LC No. 10-012170-NI

Defendants-Appellants.

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Defendants, Tim Bills Trucking, Inc. and Michael Dwayne Tyler, appeal as of right a \$1,360,644.80 judgment, following a jury trial, in favor of plaintiff, Michelle R. Button. Because no evidentiary error warrants reversal, the trial court did not improperly comment on the evidence, and the trial court did not abuse its discretion by awarding discovery sanctions, we affirm.

I. FACTS

A. BACKGROUND FACTS

According to Button, on May 1, 2008, she entered southbound US-131 in Osceola County on an entrance ramp. She saw that the left lane of US 131, the passing lane, was unoccupied and that another semi truck, the truck that Tyler was driving for Tim Bills Trucking, was “quite a way back” in that left lane. Button then changed lanes into the passing lane and saw that Tyler’s truck was rapidly approaching from behind in that lane. Button accelerated and attempted to move back into the right lane, but the front of Tyler’s truck struck her vehicle’s rear bumper and the vehicle spun counterclockwise into the median and came to rest on its side. Dr. Mark Zook, Button’s family physician, testified that his medical notes indicated that, after the accident, Button told him that the car rolled over once.

Eric Stephens, a former firefighter, testified that he was in the left hand lane after passing Tyler’s truck. According to Stephens, after he pulled away from Tyler’s truck, he saw a “puff of white smoke” in his rearview mirror and saw Button’s vehicle go into the median and flip end over end five or six times. Stephens believed that Button struck the side of Tyler’s truck on the

basis of his prior experience with witnessing accidents and where he saw the smoke. Stephens testified that if Button's vehicle had been in front of Tyler's truck, he would have seen it.

Stephens also testified that he had not spoken with a Tim Bills Trucking representative the day after the accident. After Stephens's testimony, the trial court informed the jury that Stephens had given a statement to an agent of Tim Bills Trucking the day after the accident. A Tim Bills Trucking incident report indicated that Button's vehicle struck the side of Tyler's truck.

Osceola County Sheriff's Deputy Rich Kopach testified that Tyler told him that Button's vehicle hit Tyler's truck on the passenger side. Deputy Kopach testified that Stephens also told him that he did not see the accident. Deputy Kopach testified that Button told him that she was in the left hand lane and, when she tried to escape Tyler's approaching truck, it struck her in the rear. Deputy Kopach testified that the physical evidence, including the lack of damage to the side of Tyler's truck and the extensive damage to Button's rear bumper, indicated that Button did not contact the side of Tyler's truck. Deputy Kopach testified that he concluded that the front of Tyler's truck hit the rear bumper of Button's car.

Gary McDonald, Button's accident reconstruction expert, testified that he concluded from a football-shaped tire mark on the rear bumper of Button's car that Tyler's truck was going faster than Button's car. He believed that the tire mark evidence from the road surface was not consistent with Tim Bills Trucking's theory that Button cut off Tyler's truck.

Weldon Greiger, Tim Bills Trucking's accident reconstruction expert, testified that tire mark evidence from the road surface indicated that Button began to change lanes immediately in front of Tyler's truck, causing Tyler's truck to strike her car.

B. TYLER'S ATTENDANCE AND DEPOSITION

Before trial, defense counsel stated that he had forwarded Button's subpoena to Tyler and had called to attempt to persuade him to attend trial, but Tyler indicated that he would be out of state at the time of trial. The trial court ruled that Button could introduce the admissions in Tyler's deposition pursuant to MRE 801(d)(2), but that the remaining deposition testimony was inadmissible hearsay pursuant to MRE 202 and could not come in under the unavailable witness exception in MRE 804(b)(5) because Tyler was not shown to be "unavailable."

Button's counsel read into evidence Tyler's statement that he did not see Button's vehicle between when he saw it on the entrance ramp and when it went into the median. Plaintiff counsel also read the following exchange:

Q. Would you agree with me that this statement marked as Bills No. 2, is not consistent with the testimony you offer today regarding your observations of Mrs. [Button's] vehicle?

A. Definitely, it's not. And I said that shortly after the statement was written, I would say that is not what happened.

As noted, when defense counsel sought to introduce the remaining portions of Tyler's deposition testimony, the trial court ruled that they constituted hearsay. Thus, the jury was unaware that Tyler had further stated that he initially assumed that Button had struck the side of his vehicle, but later realized that the report was incorrect and did not tell Tim Bills to revise it.

C. EQUIPMENT VIOLATIONS

Before trial, Tim Bills Trucking moved to exclude as irrelevant evidence that Tyler's truck had several equipment violations. The trial court denied the motion on the basis that (1) proximate cause of the accident itself was a question of fact for the jury and (2) the equipment violations supported a conclusion that Tim Bills Trucking negligently supervised and entrusted the vehicle to Tyler.

Button's counsel cross-examined Tim Bills, owner of Tim Bills Trucking, regarding Tyler's training and the specific equipment violations—six instances where the truck's tire tread was insufficiently deep, one instance of the brake line air pressure, and one instance of a defective leaf spring—that police found on Tyler's truck. Tim Bills testified that Tyler "should have done a better job" inspecting the truck. Officer Philip Ostafinski testified that he found the equipment violations on Tyler's truck. Larry Baareman, an expert in the operation of trucks, testified that he did not know whether any of the equipment violations played a role in the accident. Greiger, Tim Bills Trucking's expert, testified that none of the violations "had anything to do with this collision."

D. BUTTON'S INJURIES

Dr. Zook testified that a few days after the accident, Button began to complain of excruciating headaches and blurred or foggy vision, and subsequently began to suffer from confusion, disorientation, anger, difficulty processing, and memory problems. Dr. Zook testified that an eye examination from Ferris State showed that Button suffered an optic nerve lesion. Dr. Zook testified that he concluded that Button suffered a traumatic brain injury as a result of the accident.

Dr. Glen Johnson, a clinical neuropsychologist, concluded that the accident caused a traumatic brain injury because Button's activities before the accident were not consistent with her IQ and capabilities after the accident. Dr. Johnson testified that he had not previously seen the letter from Ferris State University Eye Center (the Ferris State letter), and that the letter's statement that Button suffered a loss of vision consistent with an optic nerve lesion confirmed his opinion that Button had suffered a traumatic brain injury.

Dr. John Baker, a neuropsychologist, testified that Button's emergency room records and brain scans were not consistent with a traumatic brain injury. Dr. Baker also opined that Button's IQ was consistent with her activities before the accident.

Before trial, the trial court limited Dr. Baker's testimony to an analysis of Dr. Johnson's test results as a sanction for pre-trial actions. Outside the presence of the jury, defense counsel moved that the trial court allow Dr. Baker to express an opinion on optic nerve injury in response to Dr. Johnson's testimony concerning the Ferris State letter. The trial court denied the motion.

E. SANCTIONS

During discovery, Button asked Tim Bills Trucking to admit that “in the accident in question, the front end of the vehicle driven by Defendant Tyler struck the rear of the vehicle driven by [Button.]” Tim Bills Trucking denied the request for admission.

After trial, Button moved for sanctions on the grounds that Tim Bills Trucking denied this admission. Tim Bills Trucking responded that, at the time that it denied the admission, it believed that it would prevail on the issue at trial on the basis of Stephens’s testimony and Greiger’s initial opinion. (As noted above, Stephens told a Tim Bills Trucking representative the day after the accident that he saw Button’s car “bounce off” the side of Tyler’s truck.) Tim Bills Trucking also asserted that, although Greiger testified at trial that Tyler struck Button’s car in the rear, Greiger initially did not believe that Tyler’s truck struck the rear of Button’s car and “continued to believe that until shortly before trial.”

The trial court granted Button’s motion for sanctions. The trial court determined that it was unreasonable for Tim Bills Trucking to deny Button’s request to admit because Stephens’s statement contained hyperbole, and an examination of the accident pictures clearly showed that Tyler’s truck struck Button’s car in the rear. The trial court opined that defense counsel had no reasonable basis to believe that Tim Bills Trucking would prevail on the issue at trial, and Tim Bills Trucking either should have stated that it did not have enough information to form an opinion or admitted that Tyler struck Button in the rear while denying causation. The trial court awarded Button \$66,224.70 in expenses related to Tim Bills Trucking’s failure to admit.

II. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion preserved challenges to the trial court’s evidentiary rulings.¹ The trial court abuses its discretion when its outcome falls outside the range of principled outcomes.² We review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it.³

B. TYLER’S DEPOSITION

1. PROVISIONS OF THE COURT RULES

a. MRE801(d)(2): ADMISSIONS BY PARTY-OPPONENT

MRE801(d) provides that certain deposition statements are not hearsay under specified conditions. With respect to admissions by a party opponent, such as Tyler, MRE801(d)(2)

¹ *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

² *Id.*

³ *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007).

provides that a party opponent's admissions, with exceptions not applicable here, are generally not hearsay.⁴

b. MRE804(B)(5): WITNESS UNAVAILABILITY

Depositions are generally inadmissible hearsay.⁵ However, deposition testimony may be admitted if it satisfied the requirements of the exception set forth in MRE 804(b)(5),⁶ which states that:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule *if the declarant is unavailable as a witness*:

* * *

(5) *Deposition Testimony.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, “unavailability of a witness” also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition[. . .] [(Emphasis added.)]

In addition, MRE 804(a)(5) provides:

(a) Definition of Unavailability. “Unavailability of a witness” includes situations in which the declarant—

* * *

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.

⁴ See *Genesee Merchants Bank & Trust Co v Payne*, 6 Mich App 204, 207; 148 NW2d 503 (1967), aff'd 38 Mich 234 (1968) (a party opponent's admission in a deposition may be used against him regardless of whether he is unavailable).

⁵ *Lombardo v Lombardo*, 202 Mich App 151, 154; 507 NW2d 788 (1993) (“Generally, a deposition is considered hearsay under MRE 801(c) and is inadmissible under MRE 802.”)

⁶ *Id.*, at 155.

A declarant is not unavailable as a witness if . . . absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

2. LEGAL STANDARDS

As stated above, under MRE 801(d)(2), admissions by a party opponent in a deposition are generally not considered to be hearsay; otherwise, however, depositions are generally inadmissible hearsay. However, the trial court may admit deposition testimony under MRE 804 if the deposition was lawful, the declarant is unavailable, and the party against whom the testimony is offered had similar motives for cross-examination during the deposition.⁷ Circumstances under which the witness is “unavailable” for the purposes of MRE 804 include, among other things, when the witness is (1) more than 100 miles from the place of trial or hearing, or (2) absent from the trial or hearing and the proponent of the statement was unable to secure the witness by reasonable means, unless the proponent procured the witness’s absence.⁸

3. APPLYING THE STANDARDS

Tim Bills Trucking does not contend that the trial court erred when it admitted the portions of Tyler’s testimony that constituted admissions. And, similarly, the dissent makes no such assertion. Indeed, it is accepted case law that a party opponent’s admissions in a deposition may be used against him regardless of whether that party opponent is unavailable.⁹

However, Tim Bills Trucking does contend that the trial court erroneously determined that Tyler was not more than 100 miles from the courthouse and therefore abused its discretion by not allowing the use of Tyler’s deposition testimony in its entirety. And the dissent asserts that the trial court abused its discretion when it did not admit the entirety of Tyler’s deposition testimony.

We recognize that it appears somewhat anomalous to allow portions of a witness’s deposition testimony to be used as admissions while disallowing the use of other portions of that same deposition testimony on hearsay grounds. However, the clear import of the cases and of the court rules is that deposition admissions by a party opponent are not hearsay and are therefore admissible. By contrast, non-admissions deposition testimony by a witness who is not shown to be “unavailable” is hearsay and is therefore inadmissible. The fact that deposition testimony contains both admissible statements, in the form of admissions by a party opponent, and non-admissible hearsay statements by the same person does not affect the outcome.

The trial court admitted some of Tyler’s statements as admissions because Button offered them against Tim Bills Trucking, and they were statements by Tyler, a representative of Tim Bills Trucking.¹⁰ When Tim Bills Trucking sought to offer Tyler’s explanatory statements

⁷ MRE 802; MRE 804(b)(5); *Lombardo*, 202 Mich App at 154-155.

⁸ MRE 804(a)(5); MRE 804(b)(5)(A).

⁹ *Genesee Merchants Bank & Trust*, 6 Mich App at 207.

¹⁰ See MRE 801(d)(1).

against Button, these were not admissions because Tyler is not a representative of Button. Thus, they were hearsay, and Tim Bills Trucking needed to establish that Tyler's statements fell within a hearsay exception.

Tim Bills Trucking attempted to establish that Tyler's statements fell within the hearsay exception for unavailable witnesses. The party seeking to admit evidence has the burden to establish that it is admissible.¹¹ Here, defense counsel stated that Tyler previously informed him that Tyler intended to be out of state at the time of trial. Defense counsel said that he did not know where Tyler was going.

Though Tim Bills Trucking urges us to rely on this Court's decision in *Paquin v Gregory Co*,¹² we do not find *Paquin* persuasive here. In *Paquin*, the plaintiff proved that a missing witness had moved out of state because the plaintiff provided the court with an affidavit from a process server, who stated that the witness's former landlord stated that the witness had moved to South Carolina, as well as "evidence from the post office of a forwarding address in South Carolina."¹³ Here, Tim Bills Trucking simply did not provide *any* evidence that, at the time of trial, Tyler actually had left the state or was more than 100 miles from the courthouse. The dissent simply ignores this critical fact. Again, Tim Bills Trucking has therefore not met its burden of establishing Tyler's unavailability. We conclude that the trial court did not abuse its discretion when it declined to admit Tyler's non-admissions deposition testimony under MRE 804(b)(5)(A).

Tim Bills Trucking also contends that the trial court plainly erred by failing to admit Tyler's non-admissions testimony on the grounds that Tim Bills Trucking made reasonable efforts to secure Tyler's attendance at trial. And the dissent, in a footnote, terms the "critical inquiry" to be whether defendants made a reasonable effort to procure Tyler's attendance at trial. Tim Bills Trucking recognizes that this issue is unpreserved because it did not raise this specific ground for admissibility below;¹⁴ the dissent makes no reference to the unpreserved nature of the issue and applies an abuse of discretion standard. But, as the issue is unpreserved, we review it for plain error affecting Tim Bills Trucking's substantial rights.¹⁵ An error is plain if it is clear or obvious.¹⁶ It affected a party's substantial rights if it affected the outcome of the lower court proceedings.¹⁷

¹¹ *Edry*, 486 Mich at 639; *Lombardo*, 202 Mich App at 154.

¹² *Paquin v Gregory Co*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 1996 (Docket No. 175589).

¹³ *Id.* at 5.

¹⁴ See *Polkton Charter Twp v Pellegrum*, 265 Mich App 88, 95; 693 NW2d 170 (2005); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

¹⁵ See *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

¹⁶ *Carines*, 460 Mich at 763; *Duray Dev*, 288 Mich App at 150.

¹⁷ *Carines*, 460 Mich at 763; *Duray Dev*, 288 Mich App at 150.

We conclude that the trial court did not commit plain error when it failed to admit Tyler's non-admissions deposition testimony on the grounds that Tim Bills Trucking made reasonable efforts to secure Tyler's attendance at trial. As the dissent points out, defense counsel stated that he mailed Button's subpoena to Tyler and that he telephoned Tyler and urged him to attend the trial. There is no indication that defense counsel sought to serve his own process on Tyler, attempted to contact Tyler in person, or sought other assistance in securing Tyler's attendance at trial.

Further, because Tim Bills Trucking did not raise this issue below, the trial court did not hear evidence concerning the reasonableness of defense counsel's efforts to secure the attendance of Tyler at trial or make any findings on this subject. The trial court may have determined that merely telephoning Tyler was not reasonable given that Tyler was also defense counsel's client. Thus, we conclude that the trial court did not clearly or obviously err by failing to admit Tyler's non-admissions deposition testimony under MRE 804(a)(5).

Despite the dissent's assertion that the exclusion of the non-admissions portion of Tyler's deposition testimony "deprived defendants of a substantial defense," we see no evidence that this was actually the case. Indeed, it is highly unlikely that admission of Tyler's non-admissions deposition testimony would have affected the outcome of the trial. Tyler stated at his deposition that he did not observe Button's vehicle between the time it was on the ramp and the time it was in the meridian. Thus—contrary to the dissent's assertion that the trial court erred when it excluded the deposition testimony on the issue of causation—Tyler *could not have testified at trial, nor did he testify in his deposition, concerning causation.*

Tyler admitted in his deposition testimony that the Tim Bills Trucking incident report, which said that Button struck the side of Tyler's truck, was incorrect. Tim Bills Trucking contends that it could not explain this first statement without Tyler's later statement that he *initially* believed that this first statement was correct.

However, in the admissions portion of Tyler's deposition testimony that the trial court admitted into evidence, Tyler admitted that he realized that the Tim Bills Trucking incident report was incorrect "shortly after it happened[.]" Deputy Kopach testified that Tyler told him at the scene of the accident that Button's vehicle hit the side of Tyler's semi. Thus, the trial court's decision excluding Tyler's non-admissions deposition testimony did not prevent Tim Bills Trucking from arguing that the error in the Tim Bills Trucking incident report was an early, honest mistake rather than an attempt at fraud. We conclude that the exclusion of Tyler's non-admissions deposition testimony did not prejudice Tim Bills Trucking's substantial rights.

4. MRE 106

The dissent states that we misapply the court rules. More specifically, the dissent states that, "[e]ven assuming arguendo that the majority, in isolation, is correct in its application of MRE 2.308(A) and MRE 804(b)(5), the majority's failure to apply MRE 106 denies defendants a substantial defense in this case." Thus, the dissent's problem apparently is not actually that we have misapplied the court rules. Rather, it is that we have not applied MRE 106. As the dissent states, MRE 106 provides that, "[w]hen a writing or recorded statement or part therefore is introduced by a party, an adverse party may require the introduction at that time of any other part

or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

The dissent labors mightily to demonstrate that MRE 106 should control the outcome in this case. We disagree. First, we note that appellate courts generally operate under something like the principle of parsimony, which can be paraphrased as: all other things being equal, the simplest and shortest solution to a problem is usually the best solution.¹⁸ Thus, we do not often decide issues that have become moot; we do not, with a single limited exception,¹⁹ issue advisory opinions or consider hypothetical rather than real questions; we routinely attempt to tailor our decisions and opinions as narrowly as possible; and we do not normally respond to legal theories and arguments that the parties themselves do not present.

Here, however, the dissent insists that we should consider its own theory and argument concerning the provisions of MRE 106. That theory, briefly summarized, is that the provisions of MRE 106, relating to the introduction of any part of a writing or recorded statement, trump the provisions of MRE 804(b)(5) relating to the use of deposition testimony when a witness is unavailable.

This theory is entirely of the dissent’s own making. Tim Bills Trucking did not raise MRE 106 a single time before the trial court with respect to Tyler’s deposition testimony. Tim Bills Trucking makes no reference to MRE 106 in its statement of the issues presented to this Court. And nowhere in its arguments in its brief or reply brief does Tim Bills Trucking rely at all upon MRE 106. Thus, not only is the issue of the applicability of MRE 106 *unpreserved*, it is in fact *unargued*. Addressing such an issue is a profoundly bad idea and not one that we are willing to adopt.

Further, we note that the trial court did not misapprehend the role of MRE 106. Button’s counsel raised challenges on the basis of the “rule of completeness” at other points during the trial, and the trial court allowed counsel to expand on deposition testimony that was offered. Counsel for Tim Bills simply did not raise or argue the implications of this court rule with respect to Tyler’s deposition testimony.

C. EQUIPMENT VIOLATIONS

1. LEGAL STANDARDS

Generally, the trial court may only admit relevant evidence.²⁰ Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable.²¹

¹⁸ See *Thomas M Cooley Law School v Doe I*, 300 Mich App 245, 270 n 73; 833 NW2d 331 (2013). Also consider William of Occam and Occam’s razor.

¹⁹ See Const 1963, art III, sec 7 (“Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.”)

²⁰ MRE 402.

“Violations of administrative rules and regulations are evidence of negligence.”²² However, “relevance must be specifically established.”²³ Evidence of a violation is only relevant if (1) the harm suffered is the type of harm that the regulation was designed to prevent, (2) the plaintiff is in the class of persons that the state is designed to protect, and (3) evidence supports a finding that the violation was “a proximate contributing cause of the occurrence.”²⁴ Relevance is more easily established when the regulation concerns the manner in which motor vehicles are operated, and is less easily established when the traffic regulation concerns a licensing requirement.²⁵

2. APPLYING THE STANDARDS

Tim Bills Trucking asserts that the trial court erred when it determined that evidence of the eight equipment violations, including the tire violations, was relevant. We agree that the trial court’s determination regarding causation was erroneous, but conclude that this error was harmless.

The trial court erred when it determined that the equipment violations were admissible as a proximate cause of the accident. There was no indication that any witness would testify that Tyler attempted to stop, swerve, or otherwise engage in any actions that would have placed the condition of his truck into issue. Neither expert proposed to opine that the truck’s condition was a cause of the accident. Given the lack of evidence that Tyler’s truck’s condition caused the accident, the jury could not reasonably have found that Tim Bills Trucking’s equipment violations proximately caused the accident. Thus, the evidence was not relevant on this ground.

However, we conclude that this error was harmless because the evidence was admissible under the trial court’s alternative ground concerning Button’s negligent entrustment claim. The elements of negligent entrustment are

that the motor vehicle was driven with the permission and authority of the owner; that the entrustee was in fact an incompetent driver; and that the owner knew at the time of the entrustment that the entrustee was incompetent or unqualified to operate the vehicle, or had knowledge of such facts and circumstances as would imply knowledge on the part of the owner of such incompetency.^[26]

²¹ MRE 401.

²² *Beals v Walker*, 416 Mich 469, 481; 331 NW2d 700 (1982).

²³ *Klansek v Anderson Sales & Serv, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986).

²⁴ *Id.*

²⁵ *Id.* at 88.

²⁶ *Perin v Peuler (On Rehearing)*, 373 Mich 531, 538-539; 130 NW2d 4 (1964) (quotation marks and citation omitted), overruled in part on other grounds, *McDougall v Schanz*, 461 Mich 15, 32; 597 NW2d 148 (1999).

Statutory violations may be relevant “‘to show the driver’s inexperience and incompetence in handling an automobile.’”²⁷

Here, when the trial court ruled on the motion in limine, it had not yet granted Button a directed verdict on her claim of negligent entrustment. In its opinion on the motion, the trial court emphasized that the equipment violations were evidence of Tyler’s improper training related to Button’s negligent entrustment claim.

Tim Bills Trucking and Baareman both testified that a properly trained and qualified driver will inspect his or her truck before travel. Baareman testified that a qualified driver will specifically inspect a truck’s tires. Officer Ostafinski testified that the truck’s condition demonstrated that Tyler did not do an inspection, or did an improper and incomplete inspection, or knowingly drove the truck with defects. The evidence of the equipment violations made it more likely that a material fact to one of Button’s claims—that Tyler was an incompetent or unqualified driver—was more likely to be true. The jury could have reasonably concluded that if Tyler had been properly trained, he would have been more aware of traffic conditions around his truck or would not have been driving faster than traffic in the left hand lane. The statutory violations were thus relevant to show Tyler’s inexperience and incompetence in handling trucks.

We conclude that the trial court’s error concerning its original ground for admission was harmless. This Court will not predicate error on a ruling that excludes evidence unless that ruling affected the substantial rights of a party.²⁸ The trial court’s error affects a party’s substantial rights if the error prejudiced that party.²⁹ An error prejudices a party if it affects the outcome of the lower court proceedings.³⁰

Because the evidence was properly admitted as it related to Button’s negligent entrustment claim, its admission did not prejudice Tim Bills. The evidence of these violations *after* the directed verdict was largely cumulative. And—in any event—admission of the equipment violations did not likely affect the outcome of the negligence case because neither expert testified that the equipment violations played any role in causing the accident. Thus, we conclude that admission of the violations did not affect Tim Bills Trucking’s substantial rights.

D. DR. BAKER’S TESTIMONY ABOUT THE FERRIS STATE LETTER

1. LEGAL STANDARDS

Generally, “[r]ebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.”³¹

²⁷ *Klansek*, 426 Mich at 88, quoting *Brackin v Boles*, 452 So 2d 540, 545 (Fla, 1984).

²⁸ MRE 103(a); *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 292; 730 NW2d 523 (2006).

²⁹ *People v Grant*, 445 Mich 535, 549; 520 NW2d 123 (1994).

³⁰ *Carines*, 460 Mich at 763; *Duray Dev*, 288 Mich App at 150.

³¹ *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (quotation marks and citations omitted).

Evidence is proper as rebuttal evidence if it is responsive to evidence introduced or theories developed in the other party's case in chief.³²

2. APPLYING THE STANDARDS

Tim Bills Trucking asserts that the trial court abused its discretion by ruling that Dr. Baker could not testify to rebut Dr. Johnson's testimony concerning the Ferris State letter. We disagree.

Dr. Baker's testimony regarding the Ferris State letter would have been proper rebuttal testimony because it would have contradicted or explained Dr. Johnson's testimony about that letter. However, the trial court had previously limited Dr. Baker's testimony to an interpretation of Dr. Johnson's *testing* because of misconduct by Dr. Baker's assistant during the discovery phase of the case. The Ferris State letter was not part of Dr. Johnson's testing. Thus, the trial court did not abuse its discretion when it ruled that Dr. Baker could not testify concerning Dr. Johnson's opinion about the Ferris State letter.

III. JUDICIAL COMMENTARY

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Tim Bills Trucking did not challenge the trial court's comments below and did not request a curative instruction. To preserve an issue regarding judicial commentary, a party must challenge it before the trial court.³³ We review unpreserved issues for plain error affecting a party's substantial rights.³⁴

B. LEGAL STANDARDS

A trial judge has wide discretion in matters of trial conduct, but he or she may not pierce the veil of judicial impartiality.³⁵ A judge pierces the veil of judicial impartiality when his or her conduct or comments unduly influence the jury and deprive a party of a fair and impartial trial.³⁶ We consider a judge's remarks in context to determine whether they were improper.³⁷

Michigan Rule of Professional Conduct 3.3(a)(3) provides that a lawyer may not "offer evidence that the lawyer knows to be false." The comment to this rule provides that

³² *Id.*

³³ *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). See *Duray Dev*, 288 Mich App at 150.

³⁴ *Duray Dev*, 288 Mich App at 150; *Carines*, 460 Mich at 763.

³⁵ *City of Lansing v Hartsuff*, 213 Mich App 338, 349; 539 NW2d 781 (1995).

³⁶ *Id.* at 349-350.

³⁷ *Id.* at 350; *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1, 18; 730 NW2d 29 (2006), vacated in part on other grounds, 480 Mich 913 (2007).

a lawyer may be surprised when the lawyer's client or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination *or in response to cross-examination by the opposing lawyer*. In such situations . . . the lawyer must take reasonable remedial measures. . . . It is for the tribunal then to determine what should be done—*making a statement about the matter to the trier of fact*, ordering a mistrial, or perhaps nothing. [Emphasis supplied.]

C. APPLYING THE STANDARDS

Tim Bills Trucking contends that the trial court improperly disparaged defense counsel and accused a defense witness of being a perjurer. And the dissent states that, "In essence, the trial court instructed the jury that M. Stephens' testimony was untruthful; that is, Mr. Stephens was lying." We disagree, for the simple reason that the trial court—in essence or otherwise—did no such thing.

Stephens testified at trial that he did not have a conversation with a Tim Bills Trucking representative the day after the accident. However, the parties do not now dispute that Stephens's testimony was incorrect and that the attorneys knew that it was incorrect. After the trial court dismissed Stephens as a witness, it held a bench conference, which was followed by an exchange on the record:

THE COURT: It's been brought to my attention that when Mr. Wiseley [plaintiff counsel] asked Mr. Stephens had he been contacted by an agent of Tim Bills Trucking the day after the accident, *Mr. Stephens testified no, when in fact, I find out that Mr. Stephens had been contacted by an agent of someone from Mr. Bills trucking company and, in fact, provided a recorded statement.*

MR. BREMER [defense counsel]: And, your Honor, with one matter to be considered by the Court, I will offer that statement into evidence.

MR. HOLMES [plaintiff counsel]: It's hearsay, your Honor.

MR. WISELEY [plaintiff counsel]: It's hearsay.

THE COURT: It's hearsay. It's too late now. You should have asked Mr. Stephens that. I should have known that before.

MR. BREMER: I didn't ask him about it. They did.

MR. HOLMES: Your Honor, if we're going to get into an—

MR. WISELEY: *That's an ethical issue there.*

THE COURT: *Oh, no. No, no. Let's leave—*

MR. WISELEY: All right.

THE COURT: —*that one alone*, okay.

MR. HOLMES: Yeah.

THE COURT: Let's not do this, all right. Let this one lie. You better let this one lie.

All right. So there was a recorded statement that we weren't told about—you weren't told about, okay. *So Mr. Stephens was, according to these folks, contacted by an agent and he said he wasn't, and evidently he was, and Mr. Bremer evidently knew it.*

MR. BREMER: They knew it too.

THE COURT: Well,—

MR. HOLMES: All we can do is ask him, your Honor.

MR. BREMER: We made it available to them at . . . his deposition.

MR. HOLMES: Your Honor, it's for the person putting forth the witness—

THE COURT: Mr. Bremer,—

MR. HOLMES: —to correct false testimony. We can only ask the question.

THE COURT: Okay. This is—Mr. Bremer, I'm telling you, we better just keep this quiet here, all right. I don't want to get anyone in trouble here.

All right. So let's go ahead to the jury room.

Contrary to the Tim Bills Trucking's assertions, reading the judge's statements in context, the judge did not, in front of the jury, accuse defense counsel of being unethical or the defense witness of being a perjurer. And, contrary to the dissent's assertions, the judge plainly did not instruct the jury that Mr. Stephens' testimony was untruthful or that Mr. Stephens was lying. The judge merely made a statement about demonstrably false testimony to the trier of fact. This was within the trial court's discretion as a response to false testimony under Michigan Rule of Professional Conduct 3.3. Further, the *judge* did not accuse defense counsel of acting unethically. To the contrary, to the extent that Button's counsel attempted to do so, the trial court took steps to cut off the argument. Thus, we conclude that the judge's comments were not improper or prejudicial and did not constitute plain error.

IV. SANCTIONS

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to impose sanctions.³⁸ The trial court abuses its discretion when its outcome falls outside the reasonable and principled range of outcomes.³⁹ This Court reviews for clear error the trial court's findings of fact.⁴⁰

B. LEGAL STANDARDS

Under MCR 2.312, a party may request admissions from the other party in a civil case before trial.⁴¹ The purpose of admissions is to facilitate proof at trial concerning issues in dispute and to narrow the issues through elimination.⁴² Admissions "have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact."⁴³

If a party denies . . . the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves . . . the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court shall enter the order unless it finds that

* * *

(3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or

(4) there was other good reason for the failure to admit.^[44]

A party's failure to admit a request for admission is not unreasonable solely because the party does not prevail on the issue at trial.⁴⁵

³⁸ *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 450; 540 NW2d 696 (1995).

³⁹ *Edry*, 486 Mich at 639.

⁴⁰ MCR 2.613(C).

⁴¹ MCR 2.312(A); *Midwest Bus Corp v Dep't of Treas.*, 288 Mich App 334, 350; 793 NW2d 246 (2010).

⁴² *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996); *Midwest Bus Corp*, 288 Mich App at 350-351.

⁴³ *Radtke*, 453 Mich at 420, quoting 2 McCormick Evidence (4th Ed) § 254, p 142.

⁴⁴ MCR 2.313(C).

⁴⁵ *Richardson*, 213 Mich App at 457.

C. APPLYING THE STANDARDS

Tim Bills Trucking asserts that the trial court abused its discretion in imposing sanctions. It asserts that it had a reasonable ground to believe that it might prevail concerning whether Button's car struck Tyler's truck in the side at the time that it denied Button's request to admit. We disagree.

Button requested that Tim Bills Trucking admit that "the front end of the vehicle driven by defendant Tyler struck the rear of the vehicle driven by [Button]." Tim Bills Trucking denied this request. At the hearing on Button's motion for sanctions, Tim Bills Trucking asserted that it had reasonable grounds to believe that it could prevail on the issue because Stephens unequivocally stated, the day after the accident, that he saw Button's car strike the side of Tyler's truck.

The trial court found that it was unreasonable to rely on Stephens's statement because the physical evidence contradicted it and it contained clear hyperbole. The trial court also noted that Tyler admitted that he did not know whether he hit Button's car in the rear or not. The trial court found that Tim Bills Trucking would have had reasonable grounds to (1) state that it did not know whether Tyler hit Button in the rear, or (2) admit that Tyler's semi hit Button's car in the rear and contest that it caused the accident.

The trial court therefore held that Tim Bills Trucking's denial was unreasonable. We conclude that this holding did not fall outside the reasonable and principled range of outcomes. The trial court found that it was not necessary to have an expert look at the pictures to determine that Button's car was struck in the rear because that would have been clear to a layperson. Photographs of the accident, taken on May 1, 2008, clearly show damage to the rear bumper of Button's car, paint scrape marks on the front bumper of Tyler's truck but no damage to the side of Tyler's truck. Additionally, Tyler admitted at his deposition that he did not see Button before he struck her, but he also admitted that he became aware that Button did not strike the side of his truck shortly after his accident. Thus, the trial court did not abuse its discretion when it ruled that Tim Bills Trucking did not have reasonable grounds to believe that it would prevail on the issue when it denied Button's request to admit.

Tim Bills Trucking also contends that the trial court erroneously awarded attorney fees on the entire issue of causation. We disagree with Tim Bills Trucking's characterization of the trial court's ruling.

The trial court stated that it was awarding "attorneys . . . fees and costs for the failure to admit the car was hit from the rear. . . . I need to know how much time [Button] spent on that aspect of the case. . . . [Button's counsel] should only be awarded on that particular time element you put on the failure to admit being hit from the rear." At the final hearing on the matter, the trial court found that Button's counsel supported with documentation that \$66,224.70 in costs and attorney fees were attributed to discovery and trial efforts to establish that Button was not hit in the rear. Thus, we conclude that the trial court awarded only fees and costs as they related to the specific issue that Tim Bills Trucking failed to admit.

V. CONCLUSION

We conclude that the trial court did not abuse its discretion with respect to the use of the non-admission portion of Tyler's deposition testimony. We further conclude that the trial court's sole evidentiary error was harmless. We also conclude that the trial court did not improperly comment on the evidence and did not abuse its discretion when awarding Button discovery sanctions.

We affirm.

/s/ William C. Whitbeck

/s/ E. Thomas Fitzgerald